FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

GEORGE COOPER, ABE S. TOBEROFF, EDWIN D. RICH, ALBERT G. JEFFRIES, FLOYD L. CLEMENS, and RALPH LEVERSON,

Appellants,

vs.

PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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Appellants,

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PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents,

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of the State of California entered and filed March 4, 1960, rehearing denied April 1, 1960.

Opinions Below.

The opinion of the Supreme Court of the State of California was by a divided court (4-3), Mr. Justice Schauer dissenting in a separate opinion in which Mr. Justice McComb and Mr. Justice Peters joined. The majority and dissenting opinions are reported in 53

A. C. 776, 3 Cal. Rptr. 148. Copies of the opinions and judgment are attached hereto as Appendix A. No opinion was rendered by the California Supreme Court in thereafter denying appellants' petition for rehearing, except that Schauer, McComb and Peters, JJ. were of the opinion that the petition should be granted.

Jurisdiction.

(1) By individual petitions for writs of habeas corpus, each of the appellants here challenged the constitutionality of California Penal Code, §1549.1, under which it was sought to compel the rendition of appellants from the State of California to the State of Pennsylvania to answer indictments returned in the County of Philadelphia, State of Pennsylvania alleging the "distribution of obscene literature and related offenses" (App. A, p. 1) in violation of the laws of Pennsylvania.

Pennsylvania made no claim that the appellants were ever in Pennsylvania at the time of the commission of the alleged offenses (or at any other time), nor that appellants had fled from the state (App. A, p. 2). In short, appellants were not, and are not, "fugitives from justice."

Pennsylvania sought the extradition of appellants under California law on the sole ground "that in mailing obscene literature in California to Pennsylvania each petitioner committed 'an act in this State [California] . . . intentionally resulting in a crime in' Pennsylvania. Pen. Code, Section 1549.1" (App. A, p. 2).

The validity of California Penal Code, §1549.1, aforesaid, was drawn in question throughout the state court proceedings, as is shown hereafter in the statement of

the case, on the ground of its repugnance to the Constitution and laws of the United States, and the decision of the Supreme Court of the State of California was in favor of its validity (App. A, pp. 1-11).

(2) The opinions and judgment of the California Supreme Court were filed and entered on March 4, 1960. The order denying rehearing was filed and entered on April 1, 1960. Notice of Appeal to the Supreme Court of the United States was filed on April 29, 1960 with the clerk of the Supreme Court of the State of California. By order of Mr. Chief Justice Gibson of the California Supreme Court, filed and entered June 14, 1960, the time of appellants to docket their cases on appeal to the United States Supreme Court including the Jurisdictional Statement was extended to and including July 28, 1960.[1]

(3) The jurisdiction of the Supreme Court to review the judgment herein by appeal rests upon 28 U. S. C. 1257(2).

(4) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: (*Smith v. California*, 361 U. S. 147; *Lambert v. California*, 355 U. S. 225; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; *Winters v. New York*, 333 U. S. 507; *Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U. S. 285; *Edwards v. California*, 314 U. S. 160; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.)

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[1]A copy of the said order extending the time to docket the cases on appeal has been inserted at the end of the transcript of the record prepared and certified by the clerk of the court below.

Constitutional Provisions and Statutes Involved.

The pertinent free speech and press provisions of the First Amendment; the due process and equal protection provisions of the Fourteenth Amendment; the interstate rendition provisions of Article IV, §2, Clause 2; the supremacy provisions of Article VI, Clause 2; the provisions of the federal statute punishing the mailing of obscene matter (18 U. S. C. 1461; June 25, 1948, c. 645, 62 Stat. 768, as amended June 28, 1955, c. 190, §§1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962); the provisions of the federal statute governing interstate rendition (18 U. S. C. 3182; R. S. 5278; June 25, 1948, C. 645, 62 Stat. 822); the provisions of the California Penal Code, §1548.2 (Stats. 1937, C. 554, p. 1582, §4) governing the demand for extradition and the requirement for substantial charge of crime; §1549.1 (Stats. 1937, C. 554, p. 1583, §7) governing surrender of persons not fugitives from justice or present in demanding State at the time of commission of the alleged crime; §1553.2 (Stats. 1937, C. 554, p. 1587, §23) precluding inquiry into guilt or innocence of the accused; the provisions of the Pennsylvania Criminal Procedure Act, §191.25 (19 P. S. 191.25; 1941, July 8, P. L. 288, §25) providing limited immunity from service of process in civil actions for persons brought into the State by extradition; §191.28 (19 P. S., 191.28; 1941, July 8, P. L. 288 §28) denying immunity from other criminal prosecutions for persons brought into the State by extradition; and the present Pennsylvania statute amended in 1959 punishing the advertising and distribution of obscene literature (18 P. S. 4524; 1959, Oct. 20, P. L. 1329, §1) are attached hereto as Ap-

pendix B. The pertinent provisions of the Pennsylvania statute (18 P. S. 4524, 4528) as they read at the time of the indictments were returned against appellants in Philadelphia are set forth in the opinion of the California Supreme Court (App. A, pp. 8-9, n. 1, 2, 3).

Questions Presented.

(1) Whether California Penal Code, §1549.1 (Uniform Criminal Extradition Act 6), on its face and as construed and applied to appellants herein—authorizing the surrender of national distributors of literature and other communications on demand of the executive authority of another state jurisdiction, here Pennsylvania, solely because the demanding state has indicted the aforesaid persons (citizens and residents of California, and doing business in California) for alleged violations of the demanding state's "obscenity" laws, without claim that the persons sought to be extradited were ever in the demanding state at the time of the commission of the alleged offenses or fled therefrom—abridges the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution, and the rights of appellants to the exercise of the aforesaid freedoms; arbitrarily deprives these appellants, and all other persons similarly situated, of their liberty and property without due process of law in violation of the due process provisions of the said Fourteenth Amendment; and denies these appellants, and all other persons similarly situated, the equal protection of the laws contrary to the equal protection provisions of the said Fourteenth Amendment.

(2) Whether California Penal Code, §1549.1 (Uniform Criminal Extradition Act 6), on its face and as

construed and applied to the appellants herein—authorizing the surrender of appellants to the demanding state, although the indictments returned against appellants in the said demanding state make no charge that the appellants, or any of them, committed any act in the State of California intentionally resulting in a crime in the demanding state, and the only basis for such a "charge" in the papers filed by the demanding state pursuant to the aforesaid California statute is an affidavit of an investigator in the prosecutor's office of the demanding state averring no facts, but merely the conclusory language of the statute and this solely on "information and belief" without statement of the sources of information or grounds of belief—arbitrarily and capriciously deprives these appellants of their liberty and property without due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution; deprives appellants of the exercise of the freedoms of speech and press in violation of the free speech and press provisions of the First and Fourteenth Amendments; and denies these appellants the equal protection of the laws in violation of the equal protection provisions of the said Fourteenth Amendment.

(3) Whether California Penal Code, §1549.1 (Uniform Criminal Extradition Act 6), on its face and as construed and applied to appellants herein is null and void because in conflict with and repugnant to Article IV, §2, Clause 2 of the Constitution of the United States and 18 U. S. C. 3182, in that the aforesaid state statute, contrary to the Constitution and laws of the United States, purports to authorize the surrender of the citizens of its state on the demand of the executive authority of any other state without charge or

proof that such citizens were ever in the demanding state at the time certain offenses were allegedly committed by the said citizens, or that said citizens ever fled from the said demanding state as fugitives from justice all in violation of the supremacy clause, Article VI of the Constitution of the United States.

(4) Whether California Penal Code, §1549.1 (Uniform Criminal Extradition Act 6), on its face and as construed and applied to appellants herein—authorizing the extradition of appellants to face indictments returned in 1958 under a Pennsylvania statute (18 Purdon's Penna. Stat. 4254) which is clearly void and unenforcible by reason of the decision of the Pennsylvania Supreme Court in *Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A. 2d 227 (1959); the subsequent amendment of the statute by the Pennsylvania legislature in 1959 (P. L. 872, §524, as amended October 20, 1959, Pennsylvania Legal Intelligencer, vol. 141, No. 80) and the decisions of the United States Supreme Court—arbitrarily deprives these appellants of their liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment; deprives appellants of the exercise of the freedom of speech and press in violation of the free speech and press provisions of the First and Fourteenth Amendments; and denies these appellants the equal protection of the laws in violation of the equal protection provisions of the said Fourteenth Amendment.

(5) Whether California Penal Code, §1549.1 (Uniform Criminal Extradition Act 6), on its face and as construed and applied to appellants herein is null and void because repugnant to and in conflict with 18 U. S. C. 1461, 1462, contrary to the provisions of the

supremacy clause, Article VI of the United States Constitution, and unlawfully infringes on a sphere of federal activity dealing with the distribution and transportation of "obscene" matter in interstate commerce, and other related acts with respect thereto, such sphere of activity being reserved exclusively to the federal government and respecting which the federal government has fully legislated, preempting the field.

(6) Whether California Penal Code, §1549.1 (Uniform Criminal Extradition Act 6), on its face and as construed and applied to appellants Toberoff and Cooper—authorizing the extradition of the said appellants to Pennsylvania to face indictments charging the mailing of "obscene" material previously held to be constitutionally protected by the judgment of the Honorable Peirson M. Hall, a Judge of the United States District Court for the Southern District of California, Central Division,—abridges freedom of speech and press guaranteed by the First and Fourteenth Amendments; deprives these said appellants of their liberty and property without due process of law in violation of the due process provisions of the Fourteenth Amendment; denies these said appellants the equal protection of the laws in violation of the equal protection provisions of the Fourteenth Amendment; and is null and void because in conflict with federal legislation, 18 U. S. C. 1461, 1462, federal judicial decisions and judgments, and infringes on a sphere of activity reserved exclusively to the Federal government.

Statement of the Case.

1. In the June session of 1958 of the Court of Quarter Sessions of the Peace of the County of Philadelphia, a two count indictment was returned against

appellant Cooper charging the distribution and advertising of "certain obscene literature" in 1956 in Philadelphia County contrary to the laws of Pennsylvania.[2] In the same June 1958 session, a similar two count indictment was returned against appellant Toberoff charging the commission of similar offenses in 1957. A similar two count indictment covering the year 1957 was also returned against appellant Rich. In the July sessions, 1958, a two count indictment was returned against appellants Clemens, Jeffries and Leverson charging the distribution of obscene literature and conspiracy to do so in the year 1958.

All of the indictments charged appellants with committing offenses in Philadelphia County. None of the indictments charged any of the appellants with committing any act outside of the State intentionally resulting in an offense within the State.

Shortly after the return of the aforesaid indictments each of the appellants was arrested in the County of Los Angeles in the State of California under a fugitive felony complaint emanating from the prosecuting authorities in Pennsylvania.[3] The arrest and detention

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[2]The indictments against appellants are included in Exhibit A to Sheriff's Return to the Order to Show Cause and are a part of the transcript of the record prepared and certified by the clerk of the court below, and on file in this Court.

[3]C. T. C., pp. 4-5; C. T. T., pp. 4-5; C. T. R., pp. 3-4; C. T. J., pp. 1-2; C. T. Cl., pp. 3-4; C. T. L., pp. 1-2. The reference "C. T." is to the transcript of the record prepared and certified by the clerk of the court below and on file in this Court. The first initial of each appellants' surname designates his own habeas corpus petition contained in the record. Thus "C. T. C., pp. 4-5", aforesaid, refers to those pages of appellant Cooper's petition for writ of habeas corpus contained in the record on file herein; "C. T. T., pp. 4-5" refers to the pages of appellant Toberoff's petition for a writ of habeas corpus contained in the

of each of the appellants pending requisition by the executive of the State of Pennsylvania (See, Calif. Penal C., §§ 1551-1552.2), and the proceedings thereafter, consummated about three months. In September, 1958 all the complaints were dismissed, no requisition from the State of Pennsylvania having been forthcoming. (See, Calif. Penal C., §1552.2.)

Some six months after the aforesaid dismissals, however, on March 25, 1959, requisitions did issue from the Governor of Pennsylvania to the Governor of California requesting the apprehension and delivery of appellants to a named agent authorized to receive and convey appellants to the State of Pennsylvania. Appellants were again arrested on fugitive complaints, and released on bail [C. T. C. 4-5; C. T. T. 4-5; C. T. R. 3-4; C. T. J. 1-2; C. T. Cl. 3-4; C. T. L. 1-2].

Thereafter, the Governor of California, on September 16, 1959, issued warrants to the Sheriff, the respondent herein, requiring the arrest of each of the appellants and their delivery to the custody of the named agent "to be taken back to the State of Pennsylvania" [Ex. A to Sheriff's Return to the Order to Show Cause]. Under the said executive warrants, each of the appellants was arrested, released on bail, and eventually taken into custody by the respondent Pitchess herein on October 28, 1959. On the next day petitions for writs of habeas corpus were filed by each of appellants in the District Court of Appeal of the State of California (Calif. Const., Article VI, §4b).

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record; etc. Generally, the various papers and proceedings affecting each appellant have been grouped together in the record. To a considerable extent, the federal questions presented in each of the habeas corpus proceedings are the same, except that two of the appellants (Cooper and Toberoff) by reason of some prior federal adjudications in their favor, discussed hereafter, made additional claims on their behalf.

2. The requisition papers which issued from Pennsylvania were in substance as follows:

(a) The requisition of the Governor of Pennsylvania in each case recited that it appeared by "copies of affidavit and indictment" that each of the appellants was "charged with the commission of an act or acts in the State of California intentionally resulting" in a crime under the laws of Pennsylvania.

(b) A petition to the Governor of Pennsylvania executed by the District Attorney of Philadelphia County, a Mr. Victor H. Blanc, prayed that a requisition issue, and alleged that each of appellants stands charged with the commission of crimes as appears in annexed indictments, that each appellant violated "Section 6 of the Uniform Extradition Act of July 8, 1941," and on information and belief was "a fugitive from the justice of this Commonwealth."

(c) The indictment against each of the appellants, described aforesaid, then followed the prosecutor's petition.

(d) In the case of each of the appellants, there was an affidavit by some member of the "Special Service Unit" of the "office of the District Attorney of the County of Philadelphia" who swore in similar language in each case that "according to the best of his knowledge, information and belief" each of the appellants in the City and County of Los Angeles, in the State of California "did deposit in the United States mail certain correspondence" containing "obscene literature," and that "by reason of the said act and acts of depositing the

said literature" and well knowing and intending that the literature would be delivered and distributed, each of the appellants "did do such act and acts in the said State of California which intentionally resulted in the commission" of a crime "in the City and County of Philadelphia as prohibited by the Act of General Assembly of this Commonwealth."

In the case of the appellants Clemens, Jeffries and Leverson the affiant also swore "to the best of his knowledge, information and belief" that the appellants in the County of Los Angeles, in the State of California "did combine, conspire and agree together" to deposit "certain obscene literature in the United States mail for delivery and distribution" to the City and County of Philadelphia [Ex. A attached to Sheriff's Return to the Order to Show Cause].

The warrants of arrest issued by the Governor of California recited that it had been represented to him by the Governor of Pennsylvania that each of the appellants stands charged with "committing acts in the State of California intentionally resulting in the commission of" a crime in Pennsylvania, and that the aforesaid representation, and demand for arrest and delivery of each of the appellants was accompanied by a copy of "indictment and supporting papers" [Ex. A attached to Sheriff's Return to Order to Show Cause].

3. *How the federal questions are presented.*

Each of the petitions for writs of habeas corpus filed in the District Court of Appeal recites the particular appellant's background. In general, each appellant

showed that he was a citizen and long time resident of the State of California; most were married, residing with their wives and children, and none had ever been in the State of Pennsylvania. The appellants denied the commission of any of the offenses charged against them [C. T. C. 1-3; C. T. T. 1-3; C. T. R. 1-3; C. T. J. 1-2; C. T. Cl. 1-3; C. T. L. 1-2].

Appellants in each of their individual petitions for writs of habeas corpus also alleged that no proof had been adduced to establish that they, or any of them, had ever committed an act intentionally resulting in a crime in Pennsylvania; that the statute under which appellants had been indicted had been rendered unconstitutional, null and void by decisions of the Supreme Court of the State of Pennsylvania, and that appellants were therefore not substantially charged with the commission of any crime as required by law; and that if the alleged act of mailing by each of the appellants was in any way unlawful, the federal government had exclusive jurisdiction of the offense [C. T. C. 3-6; C. T. T. 3-6; C. T. R. 3-5; C. T. J. 3-14; C. T. Cl. 3-5; C. T. L. 2-12].

Two of the appellants, Cooper and Toberoff, alleged also that prior to the indictments returned in Pennsylvania, the United States District Court, Southern District of California, Central Division, had finally adjudicated that the material Pennsylvania charged to be obscene was in fact not obscene, and also finally adjudicated that the advertisements which were the basis of one of the counts of the Pennsylvania indictments against them did not give information as to where, how or from whom obscene material might be obtained [C. T. C. 3; C. T. T. 3]. These allegations remain uncontradicted in the record.

The petitions for writs of habeas corpus also alleged that California Penal Code, §1549.1, on its face and as construed and applied in the proceedings, was unconstitutional, null and void because, among other things, the statute so construed and applied deprived each of the appellants of the liberty "of speech and press" and their liberty and property "without due process of law," and "denied them the equal protection of the laws," contrary to "the Fourteenth Amendment to the United States Constitution;" that the surrender of appellants under §1549.1 without any proof that appellants had committed an act resulting in the intentional commission of an offense in Pennsylvania, and where the Pennsylvania statute which appellants allegedly offended had in essence been declared null and void by the highest court of the State of Pennsylvania, deprived appellants of their liberty and property without due process of law in violation of the federal Constitution; that §1549.1, on its face and as construed and applied in the proceedings, was unconstitutional because in conflict with Article IV, §2, Clause 2 of the United States Constitution and 18 U. S. C., 3182 and the supremacy clause, Article VI of the Constitution of the United States; and that the Federal Government had exclusive jurisdiction over the offenses charged to appellants by Pennsylvania, and that under the supremacy clause of the United States Constitution, Article VI, the State of Pennsylvania had no jurisdiction over the offense [C. T. C. 6-9; C. T. T. 6-9; C. T. R. 5-8; C. T. J. 4-18; C. T. Cl. 5-8; C. T. L. 4-17].

As stated aforesaid, the petitions for writs of habeas corpus were filed on October 29, 1959. On October 30, 1959, the District Court of Appeal by minute order,

without opinion, denied each of the petitions for writs of habeas corpus.

On November 6, 1959, each of the appellants filed a petition for hearing by the Supreme Court, praying that the cause in the District Court of Appeal be transferred for hearing and decision by the Supreme Court of California (Calif. Const., Art. VI, §4c; Calif. Penal C., §1506, as amended).

On November 27, 1959, the California Supreme Court granted the petitions for hearing and transferred the causes to the Supreme Court. The respondent Pitchess was ordered to show cause before the Court why the relief prayed for in the proceedings should not be granted. Leave was granted to file written returns on or before December 10, 1959. The Court further ordered that all action in the extradition proceedings against appellants be stayed, pending final determination of the applications for habeas corpus, and that each appellant be released on furnishing one hundred ($100.00) dollars bail.[4]

On December 8, 1959, the respondent Pitchess filed a joint return to the aforesaid order to show cause alleging in substance that respondent had taken appellants into custody under the warrants of arrest issued by the Governor of California, and respondent attached as Exhibit A to his Return to the Order to Show Cause the

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[4]As shown in the index to the transcript of the record prepared and certified by the clerk of the court below, the petition for hearing to the Supreme Court is annexed to each appellant's petition for writ of habeas corpus and Points and Authorities. These papers in their entirety are then followed by the minute order of the District Court of Appeal and then by the order of the Supreme Court transferring the causes for hearing, in the said certified record on file herein.

extradition warrants, and also lodged with the Court (subsequently deemed filed, App. A, p. 11) the requisition papers from Pennsylvania aforementioned.

On December 23, 1959, appellants filed their Joint Traverse to the Return, incorporating in the said traverse "each and every allegation in the respective petitions for Writ of Habeas Corpus"; asserting further that the failure of the Pennsylvania indictments to allege that appellants committed acts in California intentionally resulting in a crime in the State of Pennsylvania, and the attempt to nevertheless extradite under California Penal Code, §1549.1, without allegation of *scienter*, rendered the said statute unconstitutional as construed and applied in violation of "the First and Fourteenth Amendments to the United States Constitution since it would act as a severe limitation on speech and press of all California publishers, producers and distributors of movies, books, magazines and the printed word"; that the Pennsylvania statute under which appellants were indicted violated the free speech and press provisions of the First and Fourteenth Amendments, and appellants were therefore not substantially charged with the commission of an offense; and that the extradition of appellants under §1549.1 would therefore "be arbitrary and capricious" and deprive appellants "of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution."[5]

As stated initially, the opinion of the California Supreme Court was sharply divided. The majority opinion written by Mr. Justice Traynor, in which Gibson, Spence and White, JJ., concurred, upheld the con-

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[5]The Joint Traverse follows the Sheriff's Return to the Order to Show Cause in the certified transcript of record on file herein.

stitutional validity of §1549.1, both on its face and as construed and applied to appellants indicted in Pennsylvania as aforesaid, for distributing and advertising and for conspiracy to distribute, "obscene literature" (App. A, p. 1).

The majority of the Court held that §6 of the Uniform Criminal Extradition Act (Penal Code, §1549.1) did not conflict with Article IV, §2, Clause 2 of the United States Constitution or 18 U. S. C. 3182; that the states "are free to cooperate with one another by extending interstate rendition beyond that required by federal law" (App. A, p. 2); that the case was not essentially different from that involved in *People of the State of New York v. O'Neill*, 359 U. S. 1, wherein this Court sustained a Florida statute based on the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (App. A, p. 2); that a state's refusal to extradite "a fugitive for a past offense would be its unwitting provision not only of a base of operation but of an asylum for those who commit crimes without being personally present at the place where their crimes are consummated. The Legislature validly enacted §1549.1 to prevent that result" (App. A, p. 3).

The majority opinion held further that it was immaterial that the indictments did not allege the commission of acts in California intentionally resulting in crimes in Pennsulvania, so long as the allegations were set forth in affidavits (App. A, p. 4). It was immaterial that the magistrate in Pennsylvania did not act on the affidavits or issue any warrant thereon, stated the Court, because a warrant did not have to accompany a demand based upon an affidavit (App. A, p. 5).

Having so construed the pertinent Penal Code provisions, the majority opinion then held that the appellants were protected from "unjustified extradition" (App. A, p. 7) even though the only charge in the entire record of the commission of any act in California intentionally resulting in a crime in Pennsylvania, under §1549.1, was made in an affidavit by some employee in the Philadelphia prosecutor's office on "information and belief" and without statement of the "sources of information or reasons for belief" (App. A, p. 6).

The majority opinion held that the fundamental principles of due process enunciated by this Court in *Rice v. Ames*, 180 U. S. 371, and many state court decisions, condemning attempted extradition or other restraints solely on the basis of unsupported affidavits made on information and belief (App. A, pp. 5-6) were not violated because "it must be presumed" that sufficient evidence was presented to the grand jury to support the indictments, and that "as prosecuting witnesses the affiants knew of their own knowledge that the indictments were based on petitioners' California activities" (App. A, p. 6)—although the indictments made no allegation of acts committed by appellants outside of the State of Pennsylvania and the affiants made their unsupported affidavits some ten (10) to twenty-one (21) days before the indictments were returned. [See, Ex. A attached to Sheriff's Return to Order to Show Cause.]

The majority opinion agreed that if "a statute were void on its face or had been held to be void on its face by the highest court of the demanding state or by the United States Supreme Court," then extradition would not lie (App. A, p. 8); but the majority held that the

decision of the Pennsylvania Supreme Court in *Commonwealth v. Blumenstein*, 153 A. 2d 227 did not necessarily invalidate the Pennsylvania statute under which appellants had been indicted; that the Supreme Court of Pennsylvania was free to read into the statute the *Roth-Alberts* definitions and the *scienter* requirements of *Smith v. California*—even though the Pennsylvania Supreme Court in *Commonwealth v. Blumenstein* had refrained from any such judicial legislation in invalidating a related obscenity statute, and that it was not until 1959 that the obscenity statute under which appellants were indicted and the related obscenity statute in *Blumenstein* were amended by the legislature of Pennsylvania to include the *Roth-Alberts* definition (App. A, pp. 7-11). The majority opinion held that the retrospective application of the 1959 amendments to the prosecutions against appellants was "a question for the Pennsylvania courts" (App. A, p. 11)

The majority opinion also held that the alleged Congressional pre-emption by 18 U. S. C. 1461 had been answered by this Court in *Alberts* (App. A, p. 11).

The dissenting opinion of Mr. Justice Schauer, concurred in by McComb and Peters, JJ., stressed that there was no proof in the record to justify the "Pennsylvania demands for extradition" (App. A, p. 12). The only averments in the demanding papers, in the case of each appellant, were contained in an affidavit "by an investigator for the Philadelphia District Attorney" based "on information and belief which do not state the sources of affiant's information or the grounds of his belief" (App. A, p. 13). Quoting from *Rice v. Ames*, the dissenting opinion stated that "a citizen ought not to be deprived of his personal liberty

upon an allegation which, upon being sifted, may amount to nothing more than a suspicion" (App. A, p. 13).

The dissenting opinion emphasized that "extradition can result in great inconvenience and substantial damage to the accused;" that without an official determination in a formal charge by indictment or information, or affidavits stating the sources of information and the grounds for belief, the State would unjustifiably sanction "the upsetting of the life and affairs of its residents by surrendering them to the authorities of another state" (App. A, p. 13).

The dissenting opini observed that the courts cannot "presume," and state executives are not "bound to know" that because affiants "for unstated reasons believe that petitioners committed acts in California intentionally resulting in a crime in Pennsylvania, the indictments which contain no such averments are in fact charges based upon such asserted California acts and intentions" (App. A, pp. 14-15). The dissenting opinion stated: "I cannot agree with any suggestion that purely evidentiary affidavits not charging a crime would be sufficient to supplement a charge which is defective on its face" (App. A, p. 16).

In accordance with the majority opinion aforesaid, rendered on March 4, 1960, the judgment of the California Supreme Court was that the orders to show cause be discharged, the petitions for writs of habeas corpus denied, and appellants remanded to custody (App. A, p. 11).

On March 18, 1960, a timely petition for rehearing was filed by appellants with the California Supreme Court (included in the certified transcript of the record

on file herein after the opinion of the Supreme Court). The petition for rehearing alleged, among other things, that extradition, like all other governmental action, is limited by "the due process provisions of the Fourteenth Amendment" (p. 4); that Penal Code, §1549.1 (Uniform Criminal Extradition Act, §6), upon its face and as construed and applied to the petitioners "abridges the liberty of speech and press" guaranteed by the provisions of the "First and Fourteenth Amendments to the United States Constitution" (p. 12); that the statute arbitrarily deprives appellants "of liberty and property without due process of law" in violation of the due process provisions of "the Fourteenth Amendment to the United States Constitution" (p. 12); that the statute is void "because in conflict with Article IV, §2 of the United States Constitution and 18 U. S. C. 3182" (p. 12); and that 1549.1 is invalid "because in conflict with and preempted by federal law" (p. 21).

As heretofore stated, the petition for rehearing was denied on April 1, 1960, Schauer, McComb and Peters, JJ., being "of the opinion that the petition should be granted." The notice of appeal to this Court, in the certified record, was duly filed below and presented the aforesaid federal questions for determination by this Court (pp. 4-9). The said federal questions are also presented in this Jurisdictional Statement.[6]

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[6]During the extradition proceedings in California, actions in equity on behalf of certain taxpayers and appellants were instituted in Pennsylvania seeking to enjoin the Pennsylvania prosecutor from taking any action in furtherance of the execution of the extradition warrants. The unconstitutionality of the Pennsylvania statutes was urged, as well as the invalidity of the executive action in requesting appellants' extradition from Cali-

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

California Penal Code, §1549.1 (Uniform Criminal Extradition Act, §6)—Authorizing the Involuntary Surrender in California, on Demand by Any Other State or Local Subdivision Thereof in the United States, of Publishers and National Distributors of Literature and Other Media of Communication Solely Upon the Charge That the Act of Mailing the Said Literature and Other Media of Communication Resulted in the Violation of the Obscenity Laws of the Demanding State or Local Subdivision Thereof—on Its Face and as Construed and Applied to Appellants Abridges the Free Speech and Press Provisions of the First and Fourteenth Amendments and Arbitrarily Deprives Appellants of Their Liberty and Property Without Due Process of Law and Denies Appellants the Equal Protection of the Laws in Violation of the Applicable Provisions of the Fourteenth Amendment.

1. The "operation and effect" of the statute herein, Penal Code, §1549.1, on the circulation of literature and

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fornia. A majority of the Pennsylvania Supreme Court held that a court of equity had no jurisdiction under the circumstances presented. Mr. Justice Bok dissented without opinion. Mr. Justice Bell dissented in an opinion on the ground, essentially, the §6 of the Uniform Criminal Extradition Act, and its State counterparts, as construed, violate the due process clause of the Fourteenth Amendment, and that unless injunctive relief was granted, appellants "will be taken from their homes in California and extradited to Philadelphia, with consequent loss of liberty, and with a resultant enormous expense to defendants of transporting to and maintaining in Philadelphia themselves and their witnesses who live in California." (*Cooper v. McDermott*, 159 A. 2d 486, 495 (March 22, 1960).)

other media of communication—authorizing, as the statute does, the extradition of publishers and distributors solely on the ground that in mailing literature in California to other states and localities in the country such publishers and distributors open themselves to charges of "committing an act in this State," intentionally resulting in the commission of the crime of "obscenity" in other states or localities, and this even though the conduct of publishers or distributors is "apparently harmless in the state where he acts" (App. A, p. 3)—requires, it is respectfully submitted, "close analysis and critical judgment in the light of the particular circumstances to which it is applied." (*Speiser v. Randall*, 357 U. S. 513, 520.

The decisions of this Court in *Roth v. United States* (*Alberts v. California*), 354 U. S. 476; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684 and *Smith v. California*, 361 U. S. 147, reflect in paraphrase, it is respectfully submitted, the following pertinent constitutional postulates:

(a) The free speech and free press guarantees of the First Amendment and the Fourteenth Amendment are not confined to the expression of ideas that are conventional or shared by a majority. Even ideas which are contrary to the moral standards, the religious precepts, and the legal code of the citizenry of a State are protected, whether these ideas be expressed eloquently or unconvincingly.[7]

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[7] See also, *Abrams v. United States*, 250 U. S. 616, 630; *Whitney v. California*, 274 U. S. 357, 376; *Thornhill v. Alabama*, 310 U. S. 88, 101-102; *Cantwell v. Connecticut*, 310 U. S. 296, 310; *Murdock v. Pennsylvania*, 319 U. S. 105, 116; *Martin v. Struthers*, 319 U. S. 141, 143; *Hannegan v. Esquire*, 327 U. S. 146, 157-158; *Terminiello v. Chicago*, 337 U. S. 1, 4; *Winters v. New York*, 333 U. S. 507, 510.

(b) The portrayal of sex, *e.g.*, in art, literature and scientific works is not itself sufficient reason to deny material constitutional protection. Sex has been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and public concern.

Moreover, the fundamental freedoms of speech and press are indispensable to the growth of a free society. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. There is no state power to restrict the dissemination of literature or other media of communication which are not obscene.[8]

(c) The existence of the State's power to prevent the distribution of "obscene" matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. Statutes, which on their face or as construed, are patently capable of many unconstitutional applications, or capable of having a potential inhibiting effect on speech and press, cannot be sustained.[9]

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[8]See also, *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; *One, Inc. v. Olesen*, 355 U. S. 371; *Mounce v. United States*, 355 U. S. 180; *Butler v. Michigan*, 352 U. S. 380; *Grosjean v. American Press Co.*, 297 U. S. 233.

[9]See also, *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Gelling v. Texas*, 343 U. S. 960; *Superior Films, Inc. v. Dept. of Education of Ohio (Commercial Pictures Corp. v. Regents)*, 346 U. S. 587; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; *Thornhill v. Alabama*, 310 U. S. 88; *Carlson v. California*, 310 U. S. 106; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Winters v. New York*, 333 U. S. 507; *Staub v. City of Baxley*, 355 U. S. 313.

(d) Statutes, which as construed and applied, place undue burdens upon the exercise of an individual's freedoms of speech, press, assembly or any other protected liberty, or which threaten criminal or punitive sanctions for the exercise thereof, lead to timidity and self-censorship, a censorship affecting the whole public. Such privately administered censorship impedes the distribution of all literature, both obscene and not obscene, as it impedes in other cases the exercise of other freedoms protected by the Constitution. In the final analysis, such statutes impose severe limitations on the public's access to constitutionally protected matter, on the peoples' right to know.[10]

2. In *Alberts v. California*, 354 U. S. 476, this Court held that the test for judging obscenity was as follows: "Whether to the average person, *applying contemporary community standards*, the dominant theme of the material taken as a whole appeals to prurient interest" (*supra*, at 489). (Emphasis supplied.)

This Court also added in *Alberts* that no significant difference existed between the Court's test and the definition in the A. L. I. Model Penal Code, §207.10 (Tent. Draft No. 6, 1957), viz.: ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion, and if it *goes substantially beyond customary limits of candor* in description or representation of such matters . . ." (*supra*, at 487, n. 20). (Emphasis supplied.)

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[10]See also, *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 462; *Speiser v. Randall*, 357 U. S. 513, 526; *Bates v. City of Little Rock*, 361 U. S. 516, 523; *Talley v. California*, 362 U. S. 60, 64-65, 66-67; *United States v. Raines*, 362 U. S. 17, 22.

Concurring in *Alberts*, Mr. Justice Harlan stated: "Different States will have *different attitudes* toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, *so long as there is no uniform nation-wide suppression of the book*, and so long as other States are free to experiment with the same or bolder books" (*supra*, at 506). (Emphasis supplied.)

Concurring in *Smith v. California*, 361 U. S. 147, Mr. Justice Frankfurter stressed that "the very nature of the legal concept of obscenity" is inextricably linked with the proper determination of "contemporary community standards." (*Supra*, at 164-167.) To Mr. Justice Frankfurter, testimony as to the "literary, psychological or moral standards of a community" is constitutionally required in "prosecutions for obscenity" (*supra*, at 166).

Mr. Justice Harlan, also concurring in *Smith v. California*, stated:

> ". . . regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained here unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." (*Supra*, at 171.)

Thus, the operative standard for judging obscenity, by the rulings of this Court and the opinions of a majority of its members, appears to be functionally variable. The appeal to the average, normal adult of the community in which the publication is circulated, the present critical point in the compromise between candor and shame at which the community may have arrived here and now, the general tolerance of the particular community, the customary limits of candor in description or representation of sex or nudity in the community—these appear to be the essential ingredients for testing whether literature and other media of expression are obscene or constitutionally protected material. The element of contemporary community standards appears to have made the test for determining what is or what is not obscene a matter of diversified governmental judgment throughout the Nation.

3. The determination as to whether a writing is or is not obscene according to the standards of even a *single* community is not without difficulty. Considerations of sex, age, religion, marital status, citizenship, geographic location, urban or rural background, employment status and a host of other social, political and economic considerations may enter into the determination of the "average person" in any community and the determination of the "prurient interest" of such average person.

What is generally tolerated in the community, what are its particular literary and psychological standards, its reading habits, its viewing habits, its speaking habits with reference to the repre. ntation and description of sex and nudity, what are the "customary limits of candor" and what goes "substantially beyond" such limits

—may not only require the testimony of experts (*Smith v. California, supra,* at 164-167, 171-172)—but the divination of a seer.

Whether, moreover, the standards of a community come so much in conflict with the normal sex drives of the individual as to create an "exacerbated, morbid or perverted interest" (A. L. I., Model Penal Code, Tent. Draft No. 6, p. 29) in sex or nudity has not quite been answered by the schools of Freud, Adler, Jung or other leading social scientists. (See, Note, *Obscenity—A Perusal and a Proposal,* 32 Temple L. Q. 322, 1959); Rittenhouse, David C., *Obscenity and Social Statics* in 1 William and Mary L. Rev. 303 (1958) Note, *Constitutional Law—Obscene Literature* in Wisconsin L. Rev., March, 1960, No. 2, 309, 318-321.)

The California Statute here, as construed and applied, compounds the aforesaid uncertainty in such extreme measure as to make the legislation an arbitrary weapon for the suppression of constitutionally protected literature and all other communication of ideas. The statute here, as construed, requires the publisher or distributor of books and writings—on pain of forcible transportation from home, family, friends and witnesses, with heavy financial and physical burdens, and with the stigma and accusation of "smut dealer", in areas where the publisher or distributor is friendless and unknown—to know the provisions of the statutes, codes and ordinances of all the States and local subdivisions to which matter is mailed; to know their construction

and operation by the local courts and prosecutors; *and more particularly to know the "contemporary community standards" of each of the localities wherein the material is delivered or circulated.*[11]

As was stated by Lockhart and McClure (*Literature, The Law of Obscenity, and the Constitution* in 38 Minn. L. Rev. 295) "censorship of obscenity has almost always been both irrational and indiscriminate" (p. 371). Some examples cited by the authors are these: In De-

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[11]"The governmental structure of the United States includes, in addition to the Federal Government and the 48 states (50 including Alaska and Hawaii) a total of more than 100,000 distinct units of local government, created or authorized by the States." U. S. Bureau of the Census, *Statistical Abstract of the United States: 1959* (Eighteenth edition), Washington, D.C. 1959, p. 397. According to the Census of 1950, there are 3,068 counties in the United States exclusive of 32 independent cities. *World Almanac* (1960), p. 286. The same census lists 106 cities in the United States with populations of over 100,000 (*supra*, p. 302), and 168 metropolitan areas containing at least one city having a population of 50,000 or over (*supra*, p. 303). A brief *amici curiae* of the member municipalities of the National Institute of Municipal Law Officers submitted to this Court in *Smith v. California*, October Term, 1959, No. 9, in support of a petition for rehearing, describes the organization as "composed of more than eleven hundred municipalities located in each of the fifty states, the District of Columbia and Puerto Rico" (p. 1) and "each member city" acting through its "chief legal officer" (p. 1). The petition speaks of the danger posed to the "respective communities" (p. 2), by the *Smith* decision, and states that "a random check in the NIMLO library of the codes of fifty of the largest member cities [Akron, Atlanta, Baltimore, Birmingham, Boston, Buffalo, Charlotte, Chattanooga, Chicago, Cincinnati, Cleveland, Dallas, Dayton, Des Moines, Detroit, Hartford, Houston, Indianapolis, Jacksonville, Kansas City, Long Beach, Los Angeles, Louisville, Memphis, Miami, Minneapolis, Nashville, Newark, New Haven, New Orleans, Oakland, Oklahoma City, Omaha, Providence, Pittsburgh, Portland, Richmond, Rochester, San Antonio, Seattle, Spokane, St. Louis, St. Paul, Tacoma, Toledo, Tulsa] shows that, of forty having anti-obscenity ordinances, not one contains a requirement of scienter" (p. 2).

troit, the police promulgated a list of some 150 books "declared to be in violation of Michigan law" (p. 319) including such books as James T. Farrell's *A World I Never Made*, Ernest Hemingway's *Across the River and Into the Trees*, John O'Hara's *The Farmers Hotel*, Jan Valtin's *Wintertime*, James Bellah's *Ward 20* and Lillian Smith's *Strange Fruit* (p. 319). In Youngstown, Ohio, the chief of police "prepared his own list from the appearance of the jackets and blurbs on paper bound books" (p. 319) and succeeded in suppressing, among others, John Steinbeck's *Cannery Row*, Christopher Isherwood's *The Last of Mr. Norris* and Pierre Lomure's *Moulin Rouge* (p. 319). The Board of Review of St. Cloud, Minnesota noted objectionable passages in books, and designated each book as (1) suitable reading for youth, (2) borderline, or (3) condemned (p. 312). "Among the books it condemned were W. Somerset Maugham's *Cakes and Ale* and *The Painted Veil*, William Faulkner's *The Wild Palms* and *Sanctuary*, Herbert Ernest Bates' *The Purple Plain*, Evelyn Eaton's *Quietly My Captain Waits*, Richard Wright's *Native Son* and Thomas Heggen's *Mister Roberts*" (p. 319). In Georgia, the chairman of the State Literature Commission stated: "I don't discriminate between nude women, whether or not they are art. It's all lustful to me" (p. 313). See the numerous other illustrations contained in pages 302-320, and the footnotes.[12]

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[12]The authors state: "The effects of obscenity censhorship upon authors and publishers are of course difficult to ascertain. Yet the lack of definiteness in any standard of obscenity, the absence of even a uniform indefinite standard applicable throughout the nation, and the constant threat of prosecution instigated by some local smut-hound cannot help but have a repressive effect upon authors and publishers" (*supra*, p. 372).

Other commentators have noted the peculiar standards for judging obscenity employed by state and local prosecuting officials, usually in conjunction with private censorial groups. Note, *Entertainment: Public Pressure and the Law* in 71 Harv. L. Rev. 326 (1957). In Hamtramck, Michigan, "police officials followed the 'suggestions' of the local clergy in determining what magazines were to be kept from the newsstands through threats of prosecution" (p. 347, n. 148). One local prosecutor used the test of "excluding everything he did not want his thirteen year old daughter to see" (p. 347, n. 149). In Lake County, Indiana, the prosecuting officials watch for controversial films "by checking reviews and the Legion of Decency list" (p. 346, n. 140). "This procedure has effectively kept three major films from the area in recent years: *The French Line, The Moon is Blue* and *Baby Doll*" (*id.*, p. 346, n. 140). "Despite the sincerity and good intentions which often underlie the action of local officials, it must be recognized that their enforcement of the obscenity laws is essentially extralegal" (p. 347). See also, the recent decision and order of the federal three judge court restraining, *pendente lite*, New Orleans officials from interfering with sale and distribution of publications, absent judicial determination of obscenity. (*Louisiana News Co., et al. v. Dayries, et al.* (D. C. E. D. La., July, 1960, Civ. No. 9853).)

The public press reports that officials in Southern states deem the children's book, *Three Little Pigs*, to be offensive because a recent edition of the book portrayed one of the pigs as colored. *Los Angeles Times*, June 2, 1959. Only as recently as June 24, 1960, the Philadelphia Inquirer reported that the grand jury in

Philadelphia had indicted a Chicago publisher and nine Philadelphians "in District Attorney Victor H. Blanc's all out war on smut." It appears that the evidence presented to the grand jury consisted "of a mass of books and photographs which filled six corrugated cartons." The grand jury was presented "with three Inquirer editorials supporting the District Attorney's drive to sweep smut from the city's stores and newsstands." The 16 jurors, states the press item, "deliberated only five minutes before returning the indictments."

With respect to motion pictures, similar deviations in local enforcement of obscenity statutes appear. Thus, the San Francisco Police Department announced that it had decided to drop prosecution of the motion picture, Kramoja, since although it involved nudity, it was a "documentary and anthropological study." A representative of the department further explained that "the shots involving nudity were isolated, and not aimed at inciting anti-social or immoral action. Anyway, if we moved against this picture we'd probably have to be on the alert for pictures of natives in the National Geographic Magazine." Nimmer, Melville B., *The Constitutionality of Official Censorship of Motion Pictures* in 25 Univ. of Chic. L. Rev. 625 (1958), p. 655, n. 164. ". . . . the Memphis censors have not hesitated to proscribe motion pictures which, in their view, presented unacceptable relationships between Negroes and whites" (p. 640, n. 90). The Chairman of the Fort Worth Censorship Board, in interpreting its statutory mandate to censor that which is "indecent or injurious to the morals of the citizens," states that the board regards morals as applying to nonsexual as well as sexual matters. (*Supra*, p. 640, n. 91.)

In the light of all the aforesaid, it is submitted that the operation and effect of California Penal C., §1549.1, as construed and applied, is to subject every author, publisher and distributor of literature or any other media of communication to involuntary transportation to any state or local subdivision thereof whenever some petty "village tyrant" (*W. Virginia State Bd. of Education v. Barnette*, 319 U. S. 624, 638) deems the circulation of a writing, "on information and belief," to be "an act which intentionally resulted in the commission of the crime of distributing obscene literature" in his local community (App. A, p. 12).[13]

4. It should be noted that ultimate vindication can hardly reduce the complexity, vagueness or uncertainty of this California statute, and it will not lessen the timidity, inertia or self-censorship of an author or publisher to know that vindication may come long after he has been forcibly taken from his home and transported thousands of miles away to face trial at heavy financial and physical costs. Indeed, since books such as *Lady Chatterley's Lover* or *Peyton Place*, for example have felt the pressure of private and official

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[13]Construction by the state courts of statutes and ordinances vary from State to State. In California and Massachusetts, the test is the tendency of the writing to "corrupt and deprave" the reader by arousing lascivious thoughts and lustful desire. *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853; *Commonwealth v. Isenstadt*, 318 Mass. [illegible], 62 N. E. 2d 840. Nebraska has declined to adopt the "community standards" test. *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 678 (1959). In North Carolina, the legislature adopted virtually intact §207.10 of the Model Penal Code. North Carolina, Laws, 1957, C. 1227. Oklahoma created a Literature Commission in 1957. 21 Okla. Stat. 1040.1-1040.7. "Obscene literature" is defined as "any literature offensive to the chastity or modesty, expressing or representing to the mind or view something that purity and decency forbids to be exposed, . . ." *supra*, §1040.1.

censors in various localities, widely spread throughout the country, it would be possible under §1549.1 herein to institute a series of extradition proceedings by local officials in distant areas which would keep the publisher or distributor permanently removed from his home and financially exhausted. (See, Note, *Entertainment: Public Pressures and the Law, supra*, pp. 344-345, n. 130-131.)

As construed and applied, this statute, moreover, threatens the publisher or distributor with extradition even if he does no more than mail a writing or writings (App. A, p. 4). Knowledge of the contents or objectionable character of the material is not required. The short of the matter is that a national publisher or distributor is made absolutely subject to extradition whenever any locality, or localities, charge him (on information and belief) with violating their obscenity laws. (See, *Smith v. California*, 361 U. S. 147.)

That the publisher or distributor is not a fugitive from the justice of the demanding locality is of course immaterial under this law. (Calif. Penal Code, §1549.1.) Guilt or innocence as to the crime charged may not be inquired into by the executive. (Calif. Penal Code, §1553.2.) There is therefore no opportunity to confront those who accuse the publisher or distributor with committing "an act in California intentionally resulting in a crime" in the accuser's State. When brought to the demanding State, the publisher or distributor will have very little immunity from service of process in civil actions (19 P. S. 191.25), and no immunity from other criminal prosecutions (19 P. S. 191.28).

The threat of the statute, as construed and applied, and the proceedings thereunder; its indefiniteness and uncertainty, as well as its breadth and scope, cannot help but have a repressive effect upon all authors, publishers and distributors. The application of §6 of the Uniform Criminal Extradition Act to the circulation of the press creates that very deadening uniformity which the decision in *Alberts* was apparently intended to avoid. Any locality, be it Mobile or Detroit or Tacoma can by threats of instituting extradition proceedings effectively deter distribution of written material to the entire nation. It is one thing for Mobile or Detroit or Tacoma to suppress, by penal or civil sanctions imposed on its own citizens, the reading of particular literature. Such action is serious enough. It is another thing for the entire country to be reduced to reading that which is deemed fit for Mobile or Detroit or Tacoma to read.[14]

The inevitable tendency of the statute here is to impose a severe limitation "on the public's access to constitutionally protected material." (*Smith v. California*,

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[14]The Commissioners on Uniform State Laws appear to have had some understanding of the burdens on the press when they adopted the Uniform Single Publication Act, 9C, Miscellaneous Acts. In limiting causes of actions for damages for libel or slander or "invasion of privacy" or any other tort "founded upon any single publication or exhibition or utterance" (§1, p. 173), the Commissioners stated: "It [the common law rule] means that when defamation is published in a magazine with national circulation, the person defamed may have as many as 3,000,000 possible causes of action for separate tort, based on the publication to each individual reader. The sum total of the causes of action so arising would be more than three times the estimated number of all the reported decisions in the English language, and the lifetime of one generation would not try to suffice them" (Prefatory Note, p. 171). See also, Holtzoff, J. in *Ogden v. Association of the United States Army*, 177 Fed.

361 U. S. 147.) The statute, as construed and applied, will clearly compel the publisher, and author, to avoid the writing and distribution of any book, motion picture, magazine or other writing which by any stretch of the censor's imagination can be deemed "obscene." "And society, as a consequence of the anxiety to suppress smut at all costs, may lose the values of important literary, scientific, and educational contributions. In their place it may have a distorted literature, unfaithful to life, and perhaps even a blacking out of rational public discussion of social problems of immense public importance." (*Lockhart and McClure, supra*, p. 373.)

5. Reliance by the court below upon the decision in *People of the State of New York v. O'Neill*, 359 U. S. 1 (App. A, p. 2) appears misplaced, it is respectfully submitted. The *O'Neill* decision did not involve any question of the freedom of the press. Clearly, it is not within the power of a State, or the power of States by interstate compact, to abridge freedoms of speech and press enshrined in the substantive due process provisions of the Fourteenth Amendment, or to deprive persons of their liberty and property by vague, indefinite and onerous standards of legislation, con-

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Supp. 498 (D.C.D.C., 1959). See also, Note in 73 Harv. L. Rev. 1551 (1960). ". . . it may be that *Swift v. Tyson* and its progeny were constitutionally vulnerable under the due-process clause of the fifth amendment, because of *the intolerable prelitigative uncertainty of obligation, which was engendered by varying rules purporting to control the same primary activity*" (p. 559) (emphasis supplied). (See also *Comm. v. Heinz*, 14 A. 2d 875 (Pa., 1940).)

trary to procedural due process of law.[13] (*Cf., Smith v. California,* 361 U. S., at 152-153.)

Nor is it apparent, it is respectfully submitted, why, with the vast array of civil and penal sanctions now available to federal and state officials, it is necessary to so construe and apply §1549.1 to the press and in such manner as to clearly abridge fundamental constitutional rights.

In 1935, the Law Revision Commission of the State of New York approved a bill for the extradition of persons who are not fugutives from justice, which was passed by the legislature but was vetoed by Governor Lehman. The provisions of the bill were the same as §1549.1 here (§6 of the Uniform Criminal Extradition Act). Governor Lehman stated: ". . . I feel that the section is open to the strong possibility of serious misuse and abuse. It might readily curtail freedom of speech and of the press and be the basis of persecution." Report of N. Y. Law Revision Commission, 1936, pp. 39-40.

To meet the objections of Governor Lehman, in 1936 the bill which became section 834 of the Code of Crimi-

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[13]Moreover, *O'Neill* did not involve the Uniform Criminal Extradition Act; the consequences of rendition to answer "pretended offenses," and to attend as a witness in a criminal proceeding, are quite different. Arbitrary transportation to distant locales is quite different from "a temporary interference with voluntary travel" (*supra*, p. 7). In *O'Neill*, the entire statute was under constitutional attack, on its face (*supra*, p. 8). Here, it is §6 alone which is attacked, on its face and as construed and applied. Here violations of due process are claimed.

nal Procedure (66 McKinney's Cons. Laws, Part 3) requires in part that "the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state."

The result is that in New York, the extradition statute (§6) comes into play only if the publisher or distributor in New York has gone substantially beyond the "contemporary community standards" of New York. (See, *People ex rel. Burtmann v. Silberglitt*, 15 Misc. 2d 847, 182 N. Y. S. 2d 536.) The publisher's and distributor's burden in New York is therefore reduced essentially to determining whether his own community standards have been violated; only then, and not before then, can he be subjected to multiple demands from distant areas.[13] Effective means are therefore available to deal with any supposed evil which States may seek to prevent without the necessity of invoking such broad legislation as sweeps within its ambit protected speech and press and innocent activity. (*Schneider v. State*, 308 U. S. 147, 162.)

It is submitted, therefore, that §1549.1, as construed and applied herein, cannot be sustained consistent with the free speech and press and due process provisions of the Fourteenth Amendment.

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[13]Rhode Island follows New York. L 1947, c. 1890, §6. Rhode Island, General Laws, (1956) § 12-9-8).

II.

California Penal Code, §1549.1, on Its Face and as Construed and Applied to Permit the Rendition of Appellants Without Substantial Charge or Proof of the Commission of Any Act in the State of California Intentionally Resulting in the Commission of an Offense in the Demanding State Deprives Appellants of Their Liberty and Property Without Due Process of Law and Denies Them the Equal Protection of the Laws in Violation of the Applicable Provisions of the Fourteenth Amendment.

The issue in this case was solely: did each of these appellants commit "an act in this State . . . intentionally resulting in a crime in the State" of Pennsylvania. (Calif. Penal Code, §1549.1.) This was the key issue, and without charge and proof of such "act in this State intentionally resulting in a crime" in the demanding State, the appellants under the Constitution could not be extradited. Clearly, neither conviction nor extradition of citizens can be had on a charge not made. (*De Jonge v. Oregon*, 299 U. S. 352, 362), or not tried (*Cole v. Arkansas*, 333 U. S. 196, 201), or not proved (*Thompson v. Louisville*, 362 U. S. 199, 206). These would be sheer denial of due process.

California apparently does not dispute the validity of the aforesaid fundamental requirements. Section 1549.1 provides that a person must be "charged in such other State in the manner provided in Section 1548.2," and §1548.2 provides that (1) the indictment, or (2) the information, or (3) the affidavit made before the magistrate, "must substantially charge the person demanded with having committed a crime under the law of" the demanding State.

In the record herein, no information was filed.

In the record herein, the indictment made *no* charge that appellants committed any act in the State of California intentionally resulting in the commission of the crimes charged in the Philadelphia indictments.

In the record herein, the affidavits of the employees of the Philadelphia prosecutor made *no* substantial charge that appellants committed any act in the State of California intentionally resulting in the commission of the crimes charged in the Philadelphia indictments except that on "information and belief" and without setting forth the "sources of information or reasons for belief" (App. A, p. 6), the affiants stated that each of appellants deposited for mailing obscene literature in California which "intentionally resulted" in the commission of the crime of distributing obscene literature in Philadelphia (App. A, p. 12).

In fact, there never was any substantial charge or proof in the record to show that any of these appellants committed the proscribed act in California. Indeed, the court below implicitly conceded that neither the indictment nor the affidavit made any substantial charge in compliance with the law (App. A, pp. 5-6). The majority opinion recites a plethora of federal and state precedents rejecting allegations "which, upon being sifted, may amount to nothing more than a suspicion" *Rice v. Ames,* 180 U. S. 371, 374 (App. A, pp. 5-6).

Yet, although neither the indictment nor the affidavit makes a "charge," still the court "dovetails" them together and finds that a charge is made (App. A, p. 6). This is done by the following process of reasoning: (a) the indictments establish reasonable cause to believe appellants "guilty of the offenses charged" (App.

A, p. 6); and (b) "the affidavits demonstrate that the indictments are based on petitioners' California activities" (App. A, p. 6). It must be "presumed" that sufficient evidence was presented to the grand jury; that the affiants knew that the indictments were based on petitioners' California activities; and that the respective Governors were "bound to know" that the indictments were based on appellants' "activities set forth in the affidavits, including their acts in California intentionally resulting in crimes in Pennsylvania" (App. A, p. 6).[17]

The difficulty with the courts' ruling, as the dissenting opinion points out (App. A, pp. 12-16), is that it is purely conjectural and wholly without foundation. "It does not appear to me that the California courts must presume or that the governors of Pennsylvania and California are bound to know that, because the affiants for *unstated reasons* believe that petitioners committed acts in California intentionally resulting in a crime in Pennsylvania, the indictments *which contain no such averments* are in fact charges based upon such asserted California acts and intentions" (App. A, pp. 14-15) (Emphasis supplied).

Under §1549.1 (§6) the charge of commission of the acts and intentions must be substantial. A charge "presumed or conjectured," without proof, when liberty is at stake, is no charge at all, and deprivation of

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[17]The court below relied on *Compton v. Alabama*, 214 U. S. 1 as justifying judicial abstention when a Governor has regarded an affidavit as sufficient. (App. A, p. 7.) In *Compton*, the only issue was whether an affidavit before a notary public satisfied the federal statute requiring an affidavit before a magistrate. Under the law of Georgia, a notary public was regarded as a magistrate, and so this Court felt that the judiciary should not interfere. The case does not appear to be relevant here.

liberty and property under such circumstances is arbitrary, capricious, discriminatory and without due process of law and violative of the due process provisions and equal protection provisions of the Fourteenth Amendment. The statute, as construed and applied herein, simply sets at naught the necessity of charging or proving an act intentionally resulting in a crime in another State. If the ruling is upheld, the liberties of all citizens will be largely at the mercy of any local prosecutor, or prosecutors, in "the hinterlands"—and the hands of the judiciary will be tied to afford any relief no matter how closely akin to arbitrary abduction the circumstances may appear. Surely it is a violation of due process to forcibly transport to distant areas a national publisher or distributor without any evidence, above suspicion, of any wrongdoing.

III.

California Penal Code, §1549.1 on Its Face and as Construed and Applied to Permit the Extradition of Appellants for Alleged Violations of a Statute Rendered Unconstitutional by the Decisions of the Pennsylvania Supreme Court and the United States Supreme Court Deprives These Appellants of Their Liberty and Property Without Due Process of Law and Denies Appellants the Equal Protection of the Laws in Violation of the Applicable Provisions of the Fourteenth Amendment.

It was agreed by the court below that if the Pennsylvania statute under which appellants were indicted in 1958 (18 P. S. 4524) was void on its face, then no "substantial charges" would have been made against appellants, and they would be entitled to their release (App. A, p. 8).

It was true, conceded the court below, that a companion obscenity statute (18 P. S. 4528) had been declared unconstitutional by the Supreme Court of Pennsylvania in *Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A. 2d 227 (1959), but since there were differences in language between 4524 and 4528, the Pennsylvania Supreme Court might not necessarily hold 4524 void, according to the court below (App. A, pp. 8-9). If the statute was presently invalid, stated the court below, the Pennsylvania Supreme Court was "free to interpret Section 4524 to make it valid" under *Roth-Alberts* (App. A, p. 10).

It was true, the court again stated, that both 4524 and 4528 had only been amended by the Pennsylvania legislature after *Blumenstein* in 1959 to include the *Roth-Alberts* definition, but this would not necessarily indicate recognition that 4524 was invalid prior thereto, and in any event "the effect of the 1959 amendment on prosecutions commenced prior to its date is a question for the Pennsylvania courts" (App. A, p. 11).

It is submitted that the aforesaid conclusions, under the particular circumstances herein additionally render these rendition proceedings under §1549.1 an arbitrary deprivation of the liberty and property of these appellants without due process of law.

In 1939, Pennsylvania had two criminal obscenity laws: (1) a law punishing the exhibition of "lascivious, sacreligious, obscene, indecent or immoral" motion pictures. P. L. 872, §528 (18 P. S. 4528); (2) a law punishing the distribution of any "obscene, lewd, lascivious, filthy, indecent or disgusting" writing. P. L. 872, §524 (18 P. S. 4524).

It will be observed that both sections appeared in a single statute. There can be little dispute, it is repectfully submitted, that the provisions of both laws were so vague and indefinite as to violate the free speech and press and procedural due process provisions of the Fourteenth Amendment. (*Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Commercial Pictures Corp. v. Regents*, 346 U. S. 487; *Gelling v. Texas*, 343 U. S. 969; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; *Alberts v. California*, 354 U. S. 476.)

Thereupon, in 1957 (about a year before the return of the indictments here), Pennsylvania amended 4524 to include a definition of "obscene literature." (P. L. 972, §1.) Obscene literature was defined as any writing "which is unrelated to science, art or scientific study, and taken as a whole is indecent, lewd, lascivious, and has the effect of inciting to lewdness or sexual crime." However, after having thus undertaken an explanation of obscenity, the law makers re-enacted the former provisions of the 1939 Act, which, when read in conjunction with the amended provisions, showed only a twice compounded unconstitutional law. (*Alberts v. California*, 354 U. S. 476; *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Mounce v. United States*, 355 U. S. 180; *One, Inc. v. Olesen*, 355 U. S. 371; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; *Smith v. California*, 361 U. S. 147.)

It appears clear that both laws aforesaid, as they stood in 1958, were therefore completely void under the decisions of this Court. However, we are not left to conjecture on this issue. By happenstance, the constitutional validity of 4528 was brought into question by a resident of Pennsylvania in 1958, and the law was de-

clared invalid by the Supreme Court of Pennsylvania the next year. (*Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A. 2d 227.) (See also, *Kingsley International Pictures v. Blanc*, 396 Pa. 448, 153 A. 2d 243.)

Over the objections of the dissenters, the majority of the Pennsylvania Supreme Court refused "to interpret" 4528 to include the *Roth-Alberts* definition, and held that such words as "sacrilegious," "lascivious," "indecent," "immoral," "impure," "obscene" and "indecent" were all unconstitutional tests for obscenity (*supra*, 420-421). By the decisions of the Supreme Court of Pennsylvania, there can be no question that both 4524 and 4528 were rendered entirely void. This was recognized by the dissenting judges in *Blumenstein* and it was recognized by the Pennsylvania legislature when after *Blumenstein* it again amended 4524, as well as 4528, to now include a *new* definition of obscenity, to wit, the *Roth-Alberts* definition. (P. L. 1329, §1; P. L. 945, §1.)

We are therefore left, on this record, with appellants charged by indictments returned in 1958 under an unconstitutional statute, a statute which at least from 1957 to 1959 contained a concededly invalid definition of obscenity.

The court below however, deemed it appropriate for the Pennsylvania courts to determine what effect the 1959 definition in the law would have on prior prosecutions. (App. A, p. 11). Here, it is submitted, the court below overlooked that appellants were not charged with being fugitives from justice. Persons in such status have generally been relegated to the demanding State to attack the validity of indictments, because primarily they are "fugitives" and the asylum state's interest in such legal attacks is attenuated.

But here, appellants are citizens of the State of California. They have not fled the justice of Pennsylvania. Before they can be forcibly transported to that State, it must be shown that each appellant committed "an act" intentionally resulting "in a crime" in Pennsylvania. But even if it be conceded, for purpose of argument, that each appellant committed "an act of mailing" a writing in California in 1956, 1957, or 1959, the record is clear that in those years the "crime of obscenity" did not result in Pennsylvania, because the obscenity law, with its then test for obscenity, was unconstitutional.

The issue before the court below was not essentially whether Pennsylvania can give retrospective effect to the 1959 statute (replacing the *Roth-Alberts* test for the prior test), which undoubtedly it cannot (Const., Article I, §10, Clause 1)—but whether appellants were substantially charged with committing acts in California in 1956, 1957, and 1958 intentionally resulting in "crimes" in Pennsylvania in those years. It was arbitrary, discriminatory, and capricious, and a deprivation of appellants' liberty and property without due process of law, to hold that they were "substantially charged" under the circumstances here.

IV.

California Penal Code, §1549.1 (Uniform Criminal Extradition Act, §6), as Construed, Is Unconstitutional Upon Its Face Because Contrary to and in Conflict With Article IV, §2, Clause 2 and the Supremacy Clause of Article VI of the United States Constitution, and Because the Provisions of the Law Are so Vague and Indefinite as to Permit the Discriminatory and Arbitrary Deprivations of the Liberty and Property of Persons Including These Appellants Without Procedural and Substantive Due Process of Law in Violation of the Due Process and Equal Protection Provisions of the Fourteenth Amendment.

1. The constitutional validity of §6 of the Uniform Criminal Extradition Act has never been passed upon by this Court. Doubts as to the validity of such a measure prior to its enactment were voiced almost unanimously by courts, legislators, legal scholars, text writers, other students of the law, and many members of the National Conference of Commissioners on Uniform State Laws. Following the insertion of §6 into the Uniform Act, the section was upheld by some state and federal courts as against claims of conflict with the rendition provisions of the Constitution, but doubts as to the constitutionality of the law have persisted, and this as late as 1959. (*Cooper v. McDermott*, 159 A. 2d 486, 492-495 (Pa.).) We discuss this aspect of the question in subdivision 2 herein.

It is interesting to note that Mr. Justice Bell in his dissenting opinion in *Cooper v. McDermott, supra*, as-

serting that §6 was unconstitutional, concluded by saying: "I would hold . . . that the extradition proceedings should be enjoined; otherwise these persons will be deprived *of due process*" (p. 495) (emphasis supplied). It is to this aspect of the problem—the due process infirmities of the statute—to which appellants initially address themselves.

It appears clear that the involuntary rendition of a citizen by a State, or any arm of the State (legislative, executive or judicial) is a restraint upon liberty and subject to the inhibitions of the Constitution. (*Ex parte Morgan*, 20 Fed. 298 (D. C. Ark., 1883).) The liberty discussed here is not the liberty of "asylum," or the liberty "not to be extradited." We refer here simply to the liberty of any citizen not to be subjected to governmental restraint without charge or proof either of the commission of any crime or that he is a fugitive. (*People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 189-193, affirmed 188 U. S. 691.)

Appellants stress again that California Penal Code, §1549.1 does not deal with fugitives from justice. The statute purports to authorize restraints upon a citizen's liberty if he is "substantially" (§1548.2) charged with committing "an act" in California "intentionally resulting" in a crime in the demanding State.

How does California construe this statute? California holds, first, that the "act" may be a completely neutral act, such as the act of mailing (App. A, p. 4) second, that no evidence of unlawful knowledge or intent (scienter) need be shown in the commission of the act, *i.e.*, the act can be completely innocent (App. A, p. 3); and that the charge of the "crime" resulting from the "act" can be made by a private person solely

on information and belief without evidence to support such belief. Moreover, it should be added that California, as has been noted, will not permit inquiry into guilt or innocence, and the accused is afforded no immunity from other criminal prosecutions in the demanding State and a very limited immunity from civil process.

It is submitted that the statute, so construed, is void and unconstitutional on its face. Under this statute, the right to liberty depends upon the arbitrary will of the authorities of the demanding and surrendering states. The statute, as construed, commits to a single public officer the unrestrained power to arbitrarily or discriminatorily deprive persons of their liberty without substantial charge or right of confrontation. The law, as construed, permits oppressive, unjust and illegal discriminatory enforcement of its provisions. The statute sets up no certain standards whereby men can judge what they may or may not do, and the law sweeps within its ambit free speech and press activities ordinarily protected from governmental infringement. The statute cannot stand, it is respectfully submitted, consistent with the due process and equal protection provisions of the Fourteenth Amendment. (*Yick Wo v. Hopkins*, 118 U. S. 356; *Lanzetta v. New Jersey*, 306 U. S. 451; *Lambert v. California*, 355 U. S. 225; *Speiser v. Randall*, 357 U. S. 513; *Smith v. California*, 361 U. S. 147; *Talley v. California*, 362 U. S. 60; *Thornhill v. Alabama*, 310 U. S. 88. See, *In re Oliver*, 333 U. S. 257, 273.)

2. While it was always admitted both before and after the formation of the federal union that the states had the power mutually to agree upon the conditions

governing the return of *fugitives from justice*, there is every evidence in our history that it was never accepted that states could by "comity" surrender one of its citizens who was not a fugitive, especially where the accusation of crime in another State was by *"ex officio"* oath only. (*Scott, The Law of Interstate Rendition* (1917), pp. 52-53, 150-151, 153-154.)

When early in the history of the Nation, a dispute arose between the executives of two States as to the essential requirements embodied in Article IV, §2, Clause 2 of the Constitution, President Washington submitted the question to his Attorney General, Edmond Randolph. In his definitive Report dated July 20, 1791 to the President. (See, *American State Papers* (1834), *Miscellaneous*, vol. 1, p. 41), Mr. Randolph emphasized that the Constitution embodied five essential ingredients: (1) The citizen must be *charged* in order "to exclude any wanton or unauthorized accusation from becoming the basis of the demand; (2) the citizen must be charged with *a crime*; (3) the citizen so charged must *flee from justice* because "otherwise, the most innocent citizen may be carried in chains from his own to another State"; (4) the fugitive must be *found* in another State; and (5) the demanding State must have *jurisdiction*. It was on the basis of this report and construction of the constitutional provision that Congress enacted what is now 18 U. S. C. 3182.

Commencing with *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, 617 (1842) until *Innes v. Tobin*, 240 U. S. 127 (1916), there appeared to flow from all the decided cases. (See, *Scott, supra*, pp. 275-322) the principle that the Constitution conferred exclusive

jurisdiction over extradition in the *essential elements enunciated by Edmond Randolph* upon the Federal Government. It was held that when Congress enacted the federal interstate rendition Act (now 18 U.S.C. 3182), such statute excluded all state action from the matters for which the statute *expressly or by necessary implication* provided—albeit on matters that Congress had not acted, and which still were within the limits of Congressional power under the Constitution, the States were free to enact non-conflicting additional provisions.

Thus, no citizen could be involuntarily transported by a State without charge of crime or without charge that he was a fugitive from justice. States might fill in procedural interstices not covered by the federal act, but States could not make extradition "less exacting" by omitting any requirement for a "charge" of crime, for example, or by attempting to evade the "fugitive from justice" requirement by evolving rules of "constructive presence." (*Hyatt v. Corkran*, 188 U. S. 691.)

In 1917, Mr. Scott in his treatise on Interstate Rendition stated that the notion that a State could arrest and surrender a person not a fugitive from justice was "absurd" (pp. 52-53). Such a law, stated the author, would be "in conflict with the Federal law and absolutely void" (p. 53).

In *Innes v. Tobin, supra*, this Court stated that prior to the adoption of the Constitution, "fugitives from justice" were surrendered between the States conformably to principles of comity (p. 131); that the Constitution was intended to confer authority upon Congress to deal with such subject (p. 131); that the Act of 1793 (now 18 U. S. C. 3182) was enacted for the

purpose of "controlling the subject" and that its provisions were intended to be "dominant" and so far as they operated "controlling and exclusive of state power" (p. 131). It is not open to question, stated this Court, that the provisions of the federal law "*expressly or by necessary implication* prohibited the surrender of a person in one State for removal as a fugitive to another *where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State*" (p. 131) (emphasis supplied).

It is not correct therefore to assert that the Constitution was intended to deal only with fugitives from justice, and was not concerned with those who were not fugitives. So far as interstate rendition of those accused of crime is concerned,[18] the Constitution expressly and by necessary implication deals with both sides of the same coin. Those accused of crime who are fugitives from justice may be extradited; those accused of crime who are not fugitives of justice may not be extradited.

The adoption of §6 of the Uniform Criminal Extradition Act in 1926 by the National Conference of Commissioners on Uniform State Laws was premised "upon comity between the states," rather than upon the "mandatory effect of the Constitution" 9 U. L. A. 261. The case law which developed thereafter also spoke of "comity," or the "reserved powers" of the State, or the lack of conflict between §6 and the Constitution. But as we have endeavored to show this disregards the en-

[18]This excludes discussion of convicts, parolees, witnesses, etc. where different historical considerations are involved.

tire history of Article IV, §2, Clause 2 and its settled construction.

The Commissioners on Uniform State Laws actually defeated a proposed §6 when it was first suggested in 1925.[19] In 1926, when §6 was adopted, the Committee which drafted the measure presumably to deal with a "homocide across the border of a state by shooting" expressed doubt on the constitutionality of the vague general measure. Handbook, *National Conference of Commissioners on Uniform State Laws* (1926), pp. 586-587. In 1930, in discussing amendments to the Uniform Criminal Extradition Act, §6 was referred to as "a stretch of jurisdiction." Handbook, *supra*, (1930), p. 134. In 1932, it was noted that §6 "went beyond the terms of the Federal Constitution and the Federal Statute." Handbook, *supra* (1932), pp. 399-400.[20]

As late as 1939, an address delivered before the National Association of Attorneys-General questioned the constitutional validity of §6. (Green, *Duties of the Asylum State Under the Uniform Criminal Extradition Act* in 30 Journal of Criminal L. 295, 319-324 (1939).)

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[19]See transcripts of the proceedings of the Committee of the Whole Proceedings on the Uniform Criminal Extradition Act (1925), 16-17.

[20]In the proceedings of the Committee of the Whole, referred to in the prior footnote, it was stated that "we are going around the Constitution" (1926, p. 342). See also, p. 343: "The Committee never did agree, Mr. Stevens, with the majority of the Commission . . ." See also, p. 350: ". . . I think a good many courts are going to hold the whole section 6 unconstitutional because he is not a fugitive from justice, but we are willing to try it . . ." There does not appear to be any discussion in the various proceedings of the Commissioners relative to the rights of an innocent citizen not a fugitive from justice.

It is submitted that this important question which continues to receive divergent answers from judges and legal writers should finally be decided by this Court. It is submitted further that 1549.1, as construed, is unconstitutional on its face because, in conflict with the provisions of the Constitution and the laws of the United States which constitute the supreme law of the land.

In addition, if the statute be deemed within the province of state power, then it is submitted that the statute, as construed, should in any event be declared unconstitutional on its face because it fails to strike a proper balance between comity and justice, and permits the arbitrary seizure and removal of citizens to a distant state with resultant injury to important public interest in freedoms of speech and press as well as personal liberty.

V.

California Penal Code, §1549.1 Is Void and Unconstitutional Because in Conflict With and Preempted by 18 U. S. C. 1461 and Therefore Violative of the Supremacy Clause of Article VI of the United States Constitution, All Particularly Exemplified by the Federal Adjudications in Favor of Appellants Cooper and Toberoff.

The court below dismissed this contention as rejected by this Court in *Alberts* (App. A, p. 11). The particular facts and circumstances here, however, are quite different from those in *Alberts*. Alberts was convicted under a statute, this Court held, punishing the "keeping for sale" or "advertising" obscene material and not with "actual mailing." (354 U. S. 476, 493-494.)

In this case, the appellants have been ordered transported to a distant state solely because *the act* they committed in California was "the mailing" of alleged obscene literature to Pennsylvania (App. A, p. 4). Without charge and proof of this act of *mailing*, appellants would concededly be entitled to their freedom.

Under the federal statute, 18 U. S. C., 1461, as amended in 1958 (Pub. L. 85-796, 72 Stat. 962), the knowing use of the mails for the mailing of obscene matters is assumedly made a continuous offense, with venue assumedly laid in every locality where the matter is deposited or received. Without conceding the validity of the federal statute, it is clear that the statute as amended now covers all material distributed through the mails and precludes intrusion by the States in the area of "use of the mails."

The scheme of federal regulation appears pervasive, the federal interest in the use of the mails is dominant, and potential conflict between the States and the federal government in rendition proceedings appears plain, involving a multiplicity of tribunals and a diversity of procedures. The tests for supersession appear met. (See, *Hines v. Davidowitz*, 312 U. S. 52; *Garner v. Teamsters Union*, 346 U. S. 485; *Pennsylvania v. Nelson*, 350 U. S. 497.)

Moreover, it is uncontradicted upon this record that in the cases of appellants Cooper and Toberoff a federal court of competent jurisdiction finally, fully and completely adjudicated that the material the demanding State alleged to be obscene was in fact not obscene, but on the contrary, constitutionally protected mail, and that the said appellants did not mail advertisements, made the basis of the Pennsylvania indictments, which gave

any information as to where, how or from whom obscene material might be obtained [C. T. C. 3; C. T. T. 3]. No such situation was, of course, presented in *Alberts*, and these federal adjudications in appellants' favor which have been disregarded by the court below demonstrate the essential unfairness and illegality of proceeding under the state statute clearly in conflict with the Constitution and the laws of the United States.

CONCLUSION.

It is submitted that the decision of the court below jeopardizes the liberties of all authors, publishers and distributors of literature in the United States, and undermines the rights of individuals, and the public in general, to the exercise and enjoyment of the freedoms of speech and press. Appellants believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A."

Opinion and Judgment of the Supreme Court of California.

In re George Cooper on Habeas Corpus.
In re Abe S. Toberoff on Habeas Corpus.
In re Edwin D. Rich on Habeas Corpus.
In re Albert G. Jefferies on Habeas Corpus.
In re Floyd L. Clemens on Habeas Corpus.
In re Ralph Leverson on Habeas Corpus.
Cr. 6570-6575.

Supreme Court of California, In Bank. March 4, 1960.

TRAYNOR, Justice.

By petitions for writs of habeas corpus petitioners challenge the validity of proceedings to extradite them to Pennsylvania to stand trial for the distribution of obscene literature and related offenses. We issued orders to show cause directed to the sheriff of Los Angeles County and ordered petitioners released on bail. In his return the sheriff alleges that he took custody of petitioners pursuant to extradition warrants issued by the Governor of California. Copies of the warrants were filed with the return, and the original supporting papers from the Governor of Pennsylvania to the Governor of California were lodged with the court and a motion made that they be filed. These documents disclose that petitioners were indicted for crimes committed in Philadelphia County, Pennsylvania. Three petitioners were indicted for distributing and advertising obscene literature, and three for distributing and conspiring to distribute such literature. The crimes were allegedly committed in one case in 1956, in two cases in 1957, and in three cases in 1958.

Pennsylvania seeks extradition, not under federal law on the ground that petitioners committed crimes in Pennsylvania and then fled from that state (see, U. S. Art. IV, §2, Clause 2, 18 U. S. C. A. §3182; Pen. Code, §§ 1548.1-1548.2), but under section 6 of the Uniform Criminal Extradition Act (Pen. Code, § 1549.1) on the ground that in mailing obscene literature in California to Pennsylvania each petitioner committed "an act in this State * * * intentionally resulting in a crime in" Pennsylvania. Pen. Code, § 1549.1. Petitioners contend that since such extradition is not authorized by the United States Constitution or by federal statute, section 1549.1 is invalid. It is settled, however, that the federal constitutional and statutory provisions are not exclusive and that the states are free to cooperate with one another by extending interstate rendition beyond that required by federal law. People of State of New York v. O'Neill, 359 U. S. 1, 79 S. Ct. 564, 568, 570, 3 L. Ed. 2d 585; *In re* Tenner, 20 Cal. 2d 670, 677, 128 P. 2d 338; *In re* Davis, 68 Cal. App. 2d 798, 802-807, 158 P. 2d 36; *In re* Morgan, 86 Cal. App. 2d 217, 223, 194 P. 2d 800; *Ex parte* Morgan, D. C., 78 F. Supp. 756, 761, affirmed Morgan v. Horrall, 9 Cir., 175 F. 2d 404, 407; see 9 Uniform Laws Annotated 299.

The United States Supreme Court approved such cooperation in sustaining a Florida statute (Fla. Stat. 1957, §§ 942.01-942.06, F. S. A.) based on the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 9 Uniform Laws Annotated 91. "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States

with a view to increasing harmony within the federalism created by the Constitution. Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area left to the States by the Constitution." People of the State of New York v. O'Neill, supra, 79 S. Ct. 564, 568.

Modern communication and transportation facilitate the commission of crimes across state lines. A criminal who acts in one state to commit crimes in another may pose a far more serious problem to the latter state than one who commits a crime there and then flees from justice. When the criminal who commits his crime entirely in one state flees, he ordinarily poses no threat of additional crimes therein; if extradition fails, there is only frustration of that state's interest in punishing him. In contrast, the criminal who operates from without the state's borders poses a continuing threat. Since his conduct may be undetected or apparently harmless in the state where he acts, the only effective impetus for prosecution may come from the state that suffers the harm. Far more divisive than a state's refusal to extradite a fugitive for a past offense would be its unwitting provision not only of a base of operation but of an asylum for those who commit crimes without being personally present at the place where their crimes are consummated. The Legislature validly enacted section 1549.1 to prevent that result.

Section 1549.1 provides that "The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State or in a third State, intentionally resulting in a crime in the State whose executive authority is making the de-

mand * * *." Section 1548.2 provides that the demand "shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon * * *." In the present cases, each demand is accompanied by an indictment charging the defendant named therein with committing crimes in Pennsylvania and an affidavit made before a magistrate by an investigator of the district attorney's office. The affidavits are titled "Criminal Complaint for Warrant of Arrest" and the facts stated are set forth as "true and correct according to the best of [the affiant's] knowledge, information and belief." They describe petitioners' distribution of obscene literature in Pennsylvania by mail from California and each contains a paragraph in substantially the following form: "Deponent further avers that [illegible] reason of the said act and acts of depositing the said literature and written and printed matter in the United States Mail for delivery and distribution to the said private citizens in and about the said City and County of Philadelphia, and well knowing and intending that the said literature would be so delivered and distributed, the said Floyd Clemmens did do such act and acts in the said State of California which intentionally resulted in the commission of the crime of Distributing Obscene Literature in the said City and County of Philadelphia as prohibited by the Act of the General Assembly of this Commonwealth, and which is against the peace and dignity of this Commonwealth." Since section 1548.2 provides that the essential facts may be charged either by an indictment, an information, or by an affidavit made before a magistrate, it is immaterial that the indictments did not allege the commission of acts in this state inten-

tionally resulting in crimes in Pennsylvania. Such allegations were expressly set forth in the affidavits.

It is contended, however, that the affidavits are insufficient on the ground that the magistrate did not act on them by issuing warrants. Since the purpose of affidavits to support extradition is not to secure immediate arrests but to convince the respective Governors that extradition is justified, it is immaterial that the magistrate did not act on the affidavits. People *ex rel.* Gates v. Mulcahy, 392 Ill. 498, 65 N. E. 2d 21, 22; see, People *ex rel.* Moore v. Skinner, 284 App. Div. 770, 135 N. Y. S. 2d 107, 109; *Ex parte* Peairs, 162 Tex. Cr. R. 243, 283 S. W. 2d 755, 756-757. Thus, section 1548.2 does not require that a warrant accompany a demand based upon an affidavit but only that "any warrant which was issued thereon" shall be included. *Cf., In re* Murphy, 321 Mass. 206, 72 N. E. 2d 413, 417, applying Massachusetts statute requiring that warrant accompany the affidavit.

It is further contended that affidavits made on information and belief are insufficient to support extradition unless the sources of information and reasons for belief are stated so that the Governors involved and the court in habeas corpus proceedings may determine whether extradition is warranted. See, Rice v. Ames, 180 U. S. 371, 374-376, 21 S. Ct. 406, 45 L. Ed. 577; Stark v. Livermore, 3 N. J. Super. 94, 65 A. 2d 625, 627; People *ex rel.* MacSherry v. Enright, 112 Misc. 568, 184 N. Y. S. 248, 252; State *ex rel.* Philips v. Garren, 186 S. C. 333, 195 S. E. 834, 835; *Ex parte* Murray, 112 S. C. 342, 99 S. E. 798, 800, 5 A. L. R. 1152; *cf.*, State *ex rel.* Webster v. Moeller, 191 Minn. 193, 253 N. W. 668, 669; People *ex rel.* Gates v. Mulcahy, *supra*, 392 Ill. 498, 65 N. E. 2d 21, 22; *Ex parte* Paulson, 168 Or. 457, 124 P. 2d 297,

302-303; People *ex rel.* De Martini v. McLaughlin, 243 N. Y. 417, 153 N. E. 853, 854; *Ex parte* Cooper, 163 Tex. Cr. R. 642, 295 S. W. 2d 906, 907; *Ex parte* Logan, 151 Tex. Cr. R. 129, 205 S. W. 2d 994, 995; United States *ex rel.* McCline v. Meyering, 7 Cir., 75 F. 2d 716, 718; Raftery *ex rel.* Huie Fong v. Bligh, 1 Cir., 55 F. 2d 189, 194; *Ex parte* Hart, 4 Cir., 63 F. 249, 259-260, 28 L. R. A. 801; *Ex parte* Morgan, D. C., 20 F. 298, 307. The affidavits do not set forth the affiants' sources of information or reasons for belief that petitioners had committed the offenses charged, but the purpose of the requirement that they do so is fully met when as in these cases the indictments establish reasonable cause to believe petitioners guilty of the offenses charged and the affidavits demonstrate that the indictments are based on petitioners' California activities. Thus in each case the affidavit and indictment dovetail to meet the requirements of sections 1549.1 and 1548.2. The affiants and other witnesses appeared before the grand jury. Since it is undisputed that at all relevant times petitioners have been in California, the indictments are obviously based on petitioners' mail-order businesses conducted from this state and concern the very criminal transactions set forth in the affidavits. It must be presumed that sufficient evidence was presented to the grand jury to support the indictments, and as prosecuting witnesses the affiants knew of their own knowledge that the indictments were based on petitioners' California activities. Under such circumstances the respective Governors were bound to know that the indictments were based on petitioners' activities set forth in the affidavits, including their acts in California intentionally resulting in crimes in Pennsylvania.

Sections 1549.1 and 1548.2 do not provide that the indictment alone or the affidavit alone must sufficiently al-

lege all of the facts necessary to support extradition under section 1549.1. To add such a provision would exalt form over substance. Protection from unjustified extradition does not lie in reading into the extradition laws purely technical requirements that a forewarned prosecutor could easily meet, but in the sound judgment of the respective Governors charged with the administration of those laws. Their judgment is entitled to great weight. As the United States Supreme Court stated, in reviewing the sufficiency of an affidavit to support extradition pursuant to federal law, "When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective states concerned as a sufficient basis, in law, for their acting,—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive,—the judiciary should not interfere, on *habeas corpus*, and discharge the accused, upon technical grounds, and unless it be clear that what was done was in plain contravention of law." Compton v. State of Alabama, 214 U. S. 1, 8, 29 S. Ct. 605, 607, 53 L. Ed. 885; see also, State *ex rel.* Trigg v. Thompson, 196 Tenn. 147, 270 S. W. 2d 332, 333-334; Stark v. Livermore, *supra*, 3 N. J. Super. 94, 65 A. 2d 625, 627.

Petitioners contend that Pennsulvania's obscenity statute (18 Purdon's Penna. Statutes, §4524) is unconstitutional and that therefore they should not be extradited for violating it. It has been held that the courts of the asylum state in habeas corpus proceedings need not (Pearce v. State of Texas, 155 U. S. 311, 314, 15 S. Ct. 116, 39 L. Ed. 164) and should not review the constitutionality of the statute that is alleged to have been violated. *In re* Uran, 138 Cal. App. 2d 479, 480-481, 292 P. 2d 225; *Ex parte* Key, 164 Tex. Cr. R. 524, 301 S. W.

2d 90, 91; Ullom v. Davis, 169 Miss. 208, 150 So. 519, 521; *Ex parte* Peairs, *supra*, 162 Tex. Cr. R. 243, 283 S. W. 2d 755, 757; see also State v. Clough, 71 N. H. 594, 53 A. 1086, 1092, 67 L. R. A. 946; Johnson v. Matthews, 86 U. S. App. D. C. 376, 182 F. 2d 677, 682; Ross v. Middlebrooks, 9 Cir., 188 F. 2d 308, 310-311; *In re* Backstron, 98 Cal. App. 2d 500, 501-503, 220 P. 2d 742. Its constitutionality may depend on how it will be interpreted and applied by the courts of the demanding state in the defendant's case. Of course, if it clearly appeared that a statute were void on its face or had been held to be void on its face by the highest court of the demanding state or by the United States Supreme Court, the indictment, information, or affidavit would then fail to "substantially charge the person demanded with having committed a crime under the law of [the demanding] State" (Pen. Code, § 1548.2), and the defendant should then be discharged. See, Pierce v. Creecy, 210 U. S. 387, 404-405, 28 S. Ct. 714, 52 L. Ed. 1113; *In re* Katcher, 39 Cal. 2d 30, 31, 243 P. 2d 785; Cassis v. Fair, 126 W. Va. 557, 29 S. E. 2d 245, 249, 151 A. L. R. 233.

Petitioners contend that the Pennsylvania Supreme Court has in effect determined that the obscenity law under which they have been indicted (18 Purdon's Penna. Statutes, § 4524) is void on its face by its holding that a related statute (18 Purdon's Penna. Statutes, §4528) is void for vagueness. Commonwealth v. Blumenstein, 396 Pa. 417, 153 A. 2d 227. We have examined section 4528[1] and also section 4524 as it read both before[2] and after[3] its amendment in 1957. Although there are substantial similarities in language, there are also sub-

[1] "Whoever gives or participates in, or being the owner of any premises, or having control thereof, permits within or on said premises, any dramatic, theatrical, operatic, or vaudeville exhibition, or

stantial differences, and we cannot say that because it invalidated section 4528, the Pennsylvania Supreme Court would necessarily hold section 4524 void. Similar statutes

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the exhibition of fixed or moving pictures, of a lascivious, sacrilegious, obscene, indecent, or immoral nature and character, or such as might tend to corrupt morals, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or undergo imprisonment for a period not exceeding one (1) year, or both. 1939, June 24, P.L. 872, § 528."

[2]"Whoever sells, lends, distributes, exhibits, gives away, or shows or offers to sell, lend, distribute, exhibit, or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show, or knowingly advertises in any manner, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, storypaper, paper, writing, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or any article or instrument of indecent or immoral use or purporting to be for indecent or immoral use or purpose, or whoever designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures or prepares any such book, picture, drawings, magazine, pamphlet, newspaper, storypaper, paper, writing, figure, image, matter, article or thing, or whoever writes, prints, publishes or utters, or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to do so, where, how, of whom, or by what means any, or what purports to be, any obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or whoever prints, utters, publishes, sells, lends, gives away, or shows, or has in his possession with intent to sell, lend, give away, or show, or otherwise offers for sale, loan or gift, or distribution, any pamphlet, magazine, newspaper or other printed paper devoted to the publication and principally made up of criminal news, police reports or accounts of criminal deeds, or pictures of stories of deeds of bloodshed, lust or crime, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, is guilty of a misdemeanor, and upon conviction, shall be sentenced to imprisonment not exceeding one (1) year, or to pay a fine not exceeding five hundred dollars ($500), or both. 1939, June 24, P.L. 872, § 524."

[3]"Obsence literature consists of any writing, or printed matter, picture, image, drawing, figure, photograph or other pictorial representation, which is unrelated to science, art or scientific study, and taken as a whole is indecent, lewd, lascivious, and has the effect

were sustained as applied and interpreted in Roth v. United States (Alberts v. State of California), 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 and the Pennsylvania Supreme Court is free to interpret section 4524 to make it valid under those decisions. There is no merit in the contention that section 4524 is void on its face because it does not expressly require that the defendant have knowledge that the proscribed material is obscene. The statute may reasonably be interpreted as making knowledge an element of the offense (see, Peckman v. Leonard, 39 Cal. 2d 676, 685, 249 P. 2d 267; Hirschman v. County of

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of inciting to lewdness or sexual crime. Whoever sells, lends, distributes, exhibits, gives away, or shows or offers to sell, lend, distribute, exhibit, or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show, or knowingly advertises in any manner, any obscene literature or lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, storypaper, paper, writing, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or any article or instrument of indecent or immoral use or purporting to be for indecent or immoral use or purpose, or whoever designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, storypaper, paper, writing, figure, image, matter, article or thing, or whoever writes, prints, publishes or utters, or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to do so, where, how, of whom, or by what means any, or what purports to be, any obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or whoever prints, utters, publishes, sells, lends, gives away, or shows, or has in his possession with intent to sell, lend, give away, or show, or otherwise offers for sale, loan or gift, or distribution, any pamphlet, magazine, newspaper or other printed paper devoted to the publication and principally made up of criminal news, police reports or accounts of criminal deeds, or pictures of stories of deeds of bloodshed, lust or crime, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, is guilty of a felony, and upon conviction shall be sentenced to imprisonment not exceeding two (2) years, or to pay a fine not exceeding two thousand dollars ($2000), or both. As amended 1957, July 17, P.L. 972, § 1."

Los Angeles, 39 Cal. 2d 698, 702, 249 P. 2d 287, 250 P. 2d 145); so interpreted it would not be invalid as imposing strict criminal liability. Winters v. People of State of New York, 333 U. S. 507, 510, 514-515, 68 S. Ct. 665, 92 L. Ed. 840; Fox v. State of Washington, 236 U. S. 273, 277, 35 S. Ct. 383, 59 L. Ed. 573. Smith v. People of State of California, 80 S. Ct. 215, is not to the contrary, for in that case the state court had interpreted the ordinance there involved as eliminating knowledge of the character of the proscribed literature as an element of the offense, and it was only as so interpreted that the Supreme Court held the ordinance void.

Petitioners contend, however, that the Pennsylvania Legislature has recognized the invalidity of section 4524 as it read at the times here relevant by amending it in 1959 to set forth the standard of obscenity approved in the Roth and Alberts cases. The effect of the 1959 amendment on prosecutions commenced prior to its date is a question for the Pennsylvania courts, and we find no basis for concluding that that amendment absolved petitioners of responsibility for violations alleged to have occurred before its date.

Petitioners' contention that the Pennsylvania statute may not be applied to their mail-order business on the ground that Congress pre-empted the field by enacting the federal statute punishing the mailing or advertising by mail of obscene material (18 U. S. C. A. § 1461) was answered adversely to them in the Alberts case, 354 U. S. 476, 493-494, 77 S. Ct. 1304.

The motion to file the lodged documents is granted. The orders to show cause are discharged, the petitions for writs of habeas corpus are denied, and petitioners are remanded to custody.

GIBSON, C. J. and SPENCE and WHITE, JJ., concur.

SCHAUER, Justice (dissenting).

Although I agree that the interpretation, application, and constitutionality of the Pennsylvania statute under which petitioners have been indicted are questions (at least initially) for the Pennsylvania courts, I cannot agree that the papers which accompany the Pennsylvania demands for extradition are sufficient to support such demands. In the case of each petitioner the only averment in such papers that he committed "an act in this State * * * intentionally resulting in a crime in the State whose executive authority is making the demand" (Pen. Code, § 1549.1) is in the "Criminal Complaint for Warrant of Arrest," sworn to before a magistrate by an investigator for the Philadelphia district attorney. Each such complaint avers that "to the best of * * * [the affiant's] knowledge, information and belief * * * investigation and inquiry has disclosed" that the named petitioner by depositing obscene literature in the United States mail for distribution to private citizens in Philadelphia, "did do such act and acts in the said State of California which intentionally resulted in the commission of the crime of Distributing Obscene Literature in the said City and County of Philadelphia."

I would not suggest that the governor or the courts of this state, when extradition is sought, should go behind a formal charge by information or indictment in the demanding state and inquire into the sufficiency of the evidence. *In re* Letcher (1904), 145 Cal. 563, 564, 79 P. 65 holds that such inquiry is not proper. However, I do believe that where, as here, it is necessary to resort to an affidavit before a magistrate in order to determine whether the accused is extraditable as one who intentionally committed an act in California resulting in a crime in the de-

manding state, averments on information and belief which do not state the sources of affiant's information or the grounds of his belief, are insufficient. The following considerations concerning charges against those whose extradition as actual fugitives is sought under federal statute are at least as applicable to the situation here, where the demanding state seeks the surrender of persons who assertedly committed criminal acts in this state intentionally resulting in a crime in the demanding state:

"A citizen ought not to be deprived of his personal liberty upon an allegation which, being sifted, may amount to nothing more than a suspicion." (Rice v. Ames (1901), 180 U. S. 371, 374, 21 S. Ct. 406, 45 L. Ed. 577) "Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law; the most improbable stories may be believed of any one and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred [or more than two thousand] miles off, who will swear that he has been informed and believed in his guilt." (Swart v. Kimball (1880), 43 Mich. 443, 451, 5 N. W. 635, quoted with approval in *Ex parte* Spears (1891), 88 Cal. 640, 642, 26 P. 608.)

Obviously extradition can result in great inconvenience and substantial damage to the accused. While this state should not hesitate to honor the proper demand of a sister state, it is my opinion that when California sanctions the upsetting of the life and affairs of its residents by surrendering them to the authorities of another state, this state can and should require not merely a perfunctory assertion of belief by someone in the demanding state but a showing that there has been an official determina-

tion in the demanding state resulting in a formal charge by indictment or information or, if the charge is by affidavit before a magistrate, a showing by such affidavit that the charge is based upon something more than the accuser's belief.

The return of an indictment presupposes the receipt of evidence before the grand jury and the filing of an information presupposes that evidence has been appraised by the prosecuting attorney, an officer of the court experienced in evaluating evidence (and, in states with procedure such as that of California, that witnesses have been examined before a magistrate and the magistrate has found that 'a public offense has been committed and there is sufficient cause to believe the defendant guilty of it'). But a mere hearsay affidavit (even where, like the complaints here, it is made by an official investigator) stating that the affiant for undisclosed reasons believes that the accused committed acts in California which intentionally resulted in a crime in the demanding state, in my opinion, does not justify removal of the accused to the state where the affiant has expressed such belief.

The majority say (at page 143 of 3 Cal. Rptr.,) that "in each case the [hearsay] affidavit and [the] indictment dovetail to meet the requirements of sections 1549.1 and 1548.2." They reach this conclusion because, on their view, "It must be presumed that * * * as prosecuting witnesses the affiants knew of their own knowledge that the indictments were based on petitioners' California activities" and "Under such circumstances the respective Governors were bound to know that the indictments were based on petitioners' activities set forth in the affidavits, including their acts in California intentionally resulting in crimes in Pennsylvania." It does not appear to

me that the California courts must presume or that the governors of Pennsylvania and California are bound to know that, because the affiants for unstated reasons believe that petitioners committed acts in California intentionally resulting in a crime in Pennsylvania, the indictments which contain no such averments are in fact charges based upon such asserted California acts and intentions. A sufficient charge of acts in California intentionally resulting in a crime in the demanding state is a prerequisite to extradition under section 1549.1 of the Penal Code just as a "substantial" charge of crime is a prerequisite to extradition under either section 1549.1 or section 1548.2. If the indictment wholly omitted to charge essential elements of a crime, would the majority hold that these essential elements could be "substantially" supplied by the affidavit before a magistrate, made by someone who was also a witness before the grand jury, that he believed in their existence? I would not.

In rejecting the contention that the affidavits are insufficient because the magistrate did not issue warrants of arrest based upon them the majority say (at page 143 of 3 Cal. Rptr.) that the failure to issued warrants is immaterial "[s]ince the purpose of affidavits to support extradition is not to secure immediate arrests but to convince the respective Governors that extradition is justified." While I agree that the issuance of a warrant of arrest by a magistrate of the demanding state is not a prerequisite to extradition, the quoted statement of the majority seems to contain the suggestion that where an indictment, information, or affidavit (verified complaint) before a magistrate in the demanding state is not a sufficient charge to support extradition, that procedure can nevertheless be effected if someone in the demanding state

goes before a magistrate and makes supplementary "affidavits to support extradition." I cannot agree with any suggestion that purely evidentiary affidavits not charging a crime would be sufficient to supplement a charge which is defective on its face (*cf. In re* Davis (1945), 68 Cal. App. 2d 798, 809 [3], 158 P. 2d 36).

For the reasons above stated, it is my opinion that the petitions should be granted and the petitioners should be discharged from custody.

McComb and Peters, *J. J.*, concur.

APPENDIX B.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The pertinent free speech and press provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The interstate rendition provisions of Article IV, §2, Clause 2 of the United States Constitution are:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

4. The supremacy provisions of Article VI, Clause 2 of the United States Constitution are:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or laws of any state to the contrary notwithstanding."

5. The provisions of the federal statute punishing the mailing of obscene matter (18 U. S. C. §1461; June 25, 1948, c 645, 62 Stat. 768, as amended June 28, 1955, c 190, §§ 1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962) are:

"Every obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance; and—

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instru-

ment, substance, drug, medicine, or thing—is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

6. The provisions of the federal statute governing interstate rendition (18 U. S. C. 3182; R. S. 5278; June 25, 1948, c 645, 62 Stat. 822) are:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magis-

trate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

7. The provisions of the California Penal Code, §1528.2 (Stats. 1937, C. 554, p. 1582, §4) governing the demand for extradition and the requirement for substantial charge of crime are:

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with

having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

8. The provisions of the California Penal Code, §1549.1 (Stats. 1937, C. 554, p. 1583, §7) governing surrender of persons not fugitives from justice or present in demanding state at the time of commission of the alleged crime are:

"The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime, and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other State."

9. The provisions of the California Penal Code, §1553.2 (Stats. 1937, C. 554, p. 1587, §23), precluding inquiry into guilt or innocence of the accused are:

"The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding

after demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

10. The provisions of the Pennsylvania Criminal Procedure Act, §191.25 (19 P. S. 191.25; 1941, July 8, P. L. 288, §25) providing limited immunity from service of process in civil actions for persons brought into the State by extradition are:

"A person brought into this State by or after waiver of extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings, to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited."

11. The provisions of the Pennsylvania Criminal Procedure Act, §191.28 (19 P. S. 191.28; 1941, July 8, P. L. 288, §28) denying immunity from other criminal prosecutions for persons brought into the State by extradition are:

"After a person has been brought back to this State by or after waiver of extradition proceedings he may be tried in this State for other crimes which he may be charged with having committed here, as well as that specified in the requisition for his extradition."

12. The provisions of the Pennsylvania statute amended in 1959 punishing the advertising and distribu-

tion of obscene literature (18 P. S. 4524; 1959, Oct. 20, P. L. 1329, §1) are:

"Whoever sells, lends, distributes, exhibits, gives away or shows or offers to sell, lend, distribute, exhibit or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show, or knowingly advertises in any manner any obscene literature, book, magazine, pamphlet, newspaper, storypaper, writing, drawing, photograph, figure or image, or any written or printed matter of an obscence nature, or any article or instrument of an obscene nature, or whoever designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspapers, storypaper, paper, writing, figure, image, matter, article or thing, or whoever writes, prints, publishes or utters or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, of whom, or by what means any obscene book, picture, writing, paper, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, is guilty of a felony, and upon conviction, shall be sentenced to imprisonment not exceeding two (2) years or to pay a fine not exceeding two thousand ($2000), or both.

"'Obscene', as used in this section, means that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest."